No. 11923

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD B. MORROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for for the Southern District of California Central Division

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APPELLANT'S OPENING BRIEF.

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Statement Showing Jurisdiction.

This is a civil action at common law wherein the United States of America is the plaintiff. It is therefore one which is properly within the original jurisdiction of the District Court. (Title 28, Chapter 2, Section 41 (1), U. S. Code.)

Statement of Case and Questions Involved.

This is an appeal by the appellant from a judgment of the District Court in favor of the appellee in the sum of $100,000.00, together with interest and costs. The facts are as follows:

On November 13, 1942, the appellant executed and delivered to the American National Bank of San Bernardino, hereinafter referred to as "Bank," a certain guaranty by which the appellant purported to guarantee a note

in the face amount of $225,000.00, said guaranty specifically limiting the appellant's liability thereon to $100,000.00. [Pltf. Ex. 1, Tr. of Rec. pp. 4-7.] Although this document purported to guarantee a note of even date (Nov. 13, 1942), no note bearing such date ever came into existence. The corporation did, however, execute a note in favor of the Bank dated November 18, 1942, in the face amount of $225,000.00, and further executed as security therefor, among other things, a chattel mortgage covering all of its furniture, fixtures, machinery, equipment, tools, tooling and accessories. [Tr. of Rec. pp. 29-37.] This loan, commonly called a Regulation V loan, was one of many made during the war. Such loans were made available to concerns manufacturing war material which was deemed by the War Department as essential to the war effort. Having certified to the necessity of such a loan, the War Department, through the Federal Reserve Bank acting as its fiscal agent, would stand ready to purchase the loan at any time upon demand of the lending bank.

Throughout the period of the loan, the War Department, the Federal Reserve Bank and the American National Bank of San Bernardino, acted more or less as one agency, and so unless the distinction becomes important, and for the purposes of our discussion here, they will be considered as one and the same.

About the time this loan was obtained, the corporation was having financial difficulties, whereupon the Bank with the consent of the officers and directors of the corporation, placed one Goodwin in charge as manager. A disagreement over policy followed, with the result that the Bank, through Goodwin, took complete control of the corporation, ousting the appellant and other officers and directors

from the corporation control. Mr. Goodwin continued to manage and control the corporation thereafter. [Tr. of Rec. p. 124; App. Ex. A, Tr. of Rec. pp. 45-46.]

On January 19, 1943, the corporation, at the instigation and direction of the Bank, formed a Joint Adventure with one Fritz Ziebarth. This Joint Adventure, although having many aspects beneficial to the corporation, was in effect a shotgun marriage, conceived, negotiated and consummated with little or no regard for the officers or directors of the corporation. It provided, among other things, that the corporation would deliver to the Joint Adventure for its use in its operation, certain of the corporation's assets, including the furniture, fixtures, machinery, equipment, tools, tooling and accessories described in the chattel mortgage. [Tr. of Rec. p. 23.] Concurrently therewith the Bank executed an instrument known as Consent, Waiver and Agreement of Indemnity, which provided among other things, that the Bank would not foreclose the Chattel Mortgage upon the furniture, fixtures, machinery, equipment, tools, tooling and accessories during the existence of the Joint Adventure. [Tr. of Rec. pp. 37-40.]

On November 29, 1944, the promissory note, with its accompanying security and guaranty, was assigned by the Bank to the appellee. On May 4, 1945, the note being unpaid, appellee filed this action upon the guaranty against the appellant. On January 11, 1946, the appellant filed a Motion to Dismiss the Complaint for Failure to State a Claim [Tr. of Rec. p. 7], urging that the action was prematurely brought inasmuch as the Joint Adventure was still in full force and effect at the time the action was commenced and also at the time the Motion to Dismiss was filed, and that the Bank had agreed not to foreclose during the existence of the Joint Adventure. However,

the trial court denied the Motion to Dismiss and allowed the appellant to answer. [Tr. of Rec. p. 24.]

Thereafter the appellant filed his answer denying that any cause of action against him existed upon the alleged guaranty and further alleged that he was exonerated from any such liability by reason of the alteration and extension of the note and chattel mortgage without his knowledge or consent. [Tr. of Rec. pp. 28-29.] After a trial of the issues, the court rendered a judgment in favor of the appellee and against the appellant for $100,000.00, together with interest and costs as therein set forth. From this judgment the appellant has appealed.

The questions involved in this appeal are as follows:

1. Can an action on a guaranty of a primary obligation be maintained during a period within which the right to foreclose a chattel mortgage securing the primary obligation has been suspended? This question was raised by appellant's Motion to Dismiss.

2. Does the complaint state a cause of action upon a guaranty where it appears on the face thereof that the note alleged to be the primary indebtedness differs in a material respect from the note described in the body of the guaranty? This question was raised by appellant's answer.

3. Does the complaint state a cause of action upon the guaranty where it appears that at the time of its execution no primary obligation existed? This question was raised by appellant's answer.

4. Was the conduct of the appellant such as to raise, as a matter of law, an implication of consent to the material alteration of the primary obligation? This question was raised by paragraph I of the Conclusions of Law herein.

Specification of Errors Relied Upon.

Defendant contends that the District Court erred in the following respects:

1. In denying appellant's Motion to Dismiss the Complaint for Failure to State a Claim.

2. In concluding, as a matter of law, that the appellant consented to the material alteration and extension of the primary obligation.

3. In giving judgment for the appellee upon a complaint which does not state a cause of action.

Summary of Argument.

The following is a summary of appellant's position and the points which we are urging in this argument:

1. At the time this suit was commenced, no cause of action existed against the appellant.

2. It appears from the face of the complaint that the note alleged therein to be the primary indebtedness differs in material respects from the note described in the body of the guaranty.

3. It appears on the face of the complaint that at the time the guaranty was executed, there was no primary indebtedness in existence.

4. Appellant guarantor was exonerated by reason of a material alteration in the primary obligation without his consent.

5. Appellant's knowledge of alteration does not prevent exoneration.

6. Consent to a material alteration will only be implied from conduct amounting to an estoppel.

7. There is no evidence of conduct on the part of the appellant from which the court can properly imply consent.

ARGUMENT.

I.

At the Time Suit Was Commenced, No Cause of Action Existed Against the Appellant.

There can be no question but that the right to foreclose the chattel mortgage was suspended during the existence of the Joint Adventure as the Consent, Waiver and Agreement of Indemnity specifically so states. [Tr. of Rec. pp. 37-38.] The Joint Adventure Agreement was still in existence at the time of the filing of the action, and this fact was called to the attention of the trial court by the affidavit of Jesse W. Curtis, Jr., filed with the Motion to Dismiss. [Tr. of Rec. pp. 8-10.] The Joint Venture Agreement did not terminate until January 19, 1946. [Tr. of Rec. p. 117.]

It is fundamental that if, for any reason, the debtor is not bound to make payment to the creditor, the latter may not hold the guarantor liable and that, in order to establish a cause of action against a guarantor, the creditor must show that the debtor is liable on the principal obligation.

Kilbride v. Moss, 113 Cal. 432, 45 Pac. 812.

It is true that the guarantor waived his right to require the Bank to proceed against or exhaust any security held by it [Tr. of Rec. p. 5], but this did not result in a waiver of the defense here made. An analogous situation is presented in *Rhodes v. Andrews,* 313 Ill. App. 428, 40 N. E. (2d) 537. There the transferee of the payee sued the guarantor on the note after default. The defense was that suit was premature because, subsequent to default, the principal obligor had procured a confirmation of a

plan for reorganization under Section 77b of the Bankruptcy Act, which extended the time for payment of the note, to which reorganization extension the original payee *and the guarantor consented.* The court held that the bankruptcy proceeding and the consequent extension had the effect of suspending the payee's remedy on the note not only against the principal obligor *but also against the guarantor.*

It is respectfully submitted that the District Court erred in denying appellant's motion to dismiss after it had been called to the court's attention that the Bank's remedy against the original obligor was suspended at the time of the filing of the action.

II.

It Appears on the Face of the Complaint That the Note Alleged Therein to Be the Primary Indebtedness Differs in Material Respects From the Note Described in the Body of the Guaranty.

The complaint alleges [Tr. of Rec. p. 3] a guaranty executed by the defendant, dated *November 13, 1942,* whereby appellant guaranteed payment of the corporation note referred to in said contract of guaranty as a note of "even date herewith." [Tr. of Rec. p. 5.] The complaint further alleges [Tr. of Rec. p. 2] that the note underlying the purported contract of guaranty is in fact dated *November 18, 1942.* There is no allegation that the note and guaranty are a part of one transaction, and obviously there is a fatal variance between the note to which the guaranty refers and the note which the complaint alleges to be the underlying obligation.

To properly maintain this action, the assistance of a court of equity is necessary in order to determine whether

the guaranty or the note correctly describes the primary indebtedness. In a court of equity the appellant would have had an opportunity to assert any equitable defenses available to him. Although this contention was not set forth as a ground for the Motion to Dismiss, the contention was made orally and it was repeated at the commencement of the trial. [Tr. of Rec. pp. 70-71.] We submit that the District Court should have granted appellant's Motion to Dismiss and, in any event, the complaint does not state a cause of action and will not support a judgment thereon in favor of the appellee.

III.

It Appears on the Face of the Complaint That at the Time the Guaranty Was Executed, There Was No Primary Indebtedness in Existence.

It is fundamental that a guaranty cannot exist without a primary obligation to which it is collateral. A primary obligation must be shown to exist before there can be any cause of action against an alleged guarantor.

Yangtsze Rapid S. S. Co. v. Deutsh-Asiatic Bank (C. C. A. 9th), 59 F. (2d) 8, 12;

Kilbride v. Moss, 113 Cal. 432 (45 Pac. 812);

Glassell v. Coleman, 94 Cal. 260 (29 Pac. 508);

Ingalls v. Bell, 43 Cal. App. (2d) 356 (110 P. (2d) 1068);

City Nat'l Bank v. Lemco Mfg. Co., 57 Cal. App. 566 (207 Pac. 509).

In the language of the last cited case at page 567:

> "The obligation of the guarantor being accessory to that of the principal obligor, it would seem to be as self-evident in law that if there is no principal there can be no accessory, as in physics it is self-evident that there can be no shadow where there is no substance."

Brandt on Suretyship and Guaranty, 3rd Ed., Secs. 4, 19, 163, and notes.

Although the complaint alleges a "continuing guaranty," reference to the guaranty will show beyond question that the guaranty is not a "continuing" one, but simply a guaranty relating to a certain promissory note "of even date" therewith.

It is true that it was stipulated at the trial on the merits of the action that the note and guaranty were executed as a part of one transaction. [Tr. of Rec. p. 72.] It is also true that the District Court found as a Conclusion of Law that the note and guaranty were a part of one transaction. However, it is the contention of the defendant that *as a matter of pleading,* the complaint failed to state a cause of action because of the variance.

The denial of the motion was an error and the District Court did not have jurisdiction in this case to render judgment in favor of the appellee.

IV.

Appellant Guarantor Was Exonerated by Reason of a Material Alteration in the Primary Obligation Without His Consent.

Section 2819 of the Civil Code of California provides:

> "A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto, in any way impaired or suspended."

Section 2787 of the Civil Code of California abolishes the distinction between sureties and guarantors.

An agreement not to foreclose a mortgage for a certain period of time is both a material alteration and an impairment and suspension of remedies or rights of the creditors sufficient to release a guarantor unless the guarantor consents.

Braun v. Crew, 183 Cal. 728 (192 Pac. 531);
Tuohy v. Woods, 122 Cal. 665 (55 Pac. 683);
Miller v. Roach, 15 Cal. App. (2d) 427 (59 P. (2d) 418).

By expressed provision in the Consent, Waiver and Agreement of Indemnity, the Bank agreed not to foreclose or to enforce any lien or claim on or upon any of the said tools, fixtures, equipment, patents, or patent rights, or interfere with the possession or use of the said equipment during the existence of the said chattel mortgage. . . ." [Tr. of Rec. pp. 37-38.]

In view of the foregoing, there can be no question but what the appellant as guarantor was exonerated unless he consented to the suspension of remedies as hereinabove set forth.

V.

Appellant's Knowledge of Alteration Does Not Prevent Exoneration.

Mere knowledge of acts done by the creditor without objection on the part of the surety does not constitute consent and, as a general rule, some affirmative action is necessary.

Pac. Nat. Agri. Credit Corp. v. Hagerman, 39 N. M. 549, 51 P. (2d) 857;

City of Middletown v. Aetna Indemnity Co., 97 App. Div. 344, 90 N. Y. Supp. 16, 17;

Lambert v. Shetler, 71 Iowa 463, 32 N. W. 424;

Thompson v. Metropolitan Bldg. Co., 95 Wash. 546, 164 Pac. 222;

A. B. Klise Lumber Co. v. Enkima, 146 Minn. 5, 181 N. W. 201;

Union Indemnity Co. v. Benton County Lumber Co., 179 Ark. 752, 18 S. W. (2d) 327 at 330;

American Iron & Steel Mfg. Co. v. Beal, 50 C. J. 114;

See 101 *A. L. R.* 1310 for a collection of cases supporting the following statement:

> "The rule that a surety or endorser, who merely remains silent on learning of facts which are grounds for his discharge from liability, may thereafter assert his claim for relief by reason of such facts, appears to be established by a majority of the cases upon that point."

In the case of *Pac. Nat. Agri. Credit Corp. v. Hagerman*, 39 N. M. 549, 51 P. (2d) 857, 101 A. L. R. 1301, the court says:

> "One of the main arguments urged upon us by appellee's able counsel is that by remaining silent and passive after learning of the deduction with knowledge that the creditor was continuing its advances on the face of his endorsement, and by failing to notify it that he claimed a discharge and would refuse to be bound, the appellant acquiesced in the deductions, and cannot now be heard to question it.
>
> "But was it appellant's duty to speak? If not, then he may still be heard to complain on this breach of the conditions under which he became an endorser.
>
> "Mr. Brandt, in his work on Suretyship & Guaranty (3rd ed.), Section 279, says: 'If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge. It is not enough to bind him, that he is informed and is passive. He is not required to object or protest. He must actively concur and consent to be bound by the terms of the new agreement.'
>
> "The author of the text on Principal and Surety, in Corpus Juris, states the rule at 50 C. J. 113, 114, Section 192, as follows: 'Consent may be implied from the conduct of the surety, such as advice or a request to perform the acts relied on as a discharge, or from a course of business or usage known to the surety. Where consent is to be implied, the facts from which it is to be implied, must very clearly warrant the implication. Mere knowledge of the acts done by the creditor or obligee subsequent to the making of the contract of suretyship without objec-

tion on the part of the surety, is not consent by the latter for, as a general rule, some affirmative action is necessary.' ·

"In *City of Middletown v. Aetna Indemnity Co.*, 97 App. Div. 344, 90 N. Y. S. 16, 17, the court said: 'No duty devolved upon the appellant to speak when it learned of the deviations that had been made from the contract which it had guaranteed. Its release had already been effectuated and no authority is presented to us to show that after the release was complete, it devolved upon the appellant to comment either one way or the other upon the situation.

" 'It is undoubtedly true, we think, that if an extension of time is granted the principal, the surety is discharged unless he consents thereto. Mere knowledge of such extension without more, is immaterial. *Lambert v. Shetler,* 71 Iowa 463, 32 N. W. 424.

" 'It is not necessary to the discharge of a surety on account of indulgence given by the creditor to the principal, that the surety should show notice to the creditor of his dissent to the indulgence. The act of the creditor discharges the surety without any act of dissent on the part of the surety. The surety stands upon his legal right and the creditor must look to his own acts and their legal consequences.' "

It may be admitted that appellant, Howard B. Morrow, had knowledge of the contents of the Consent, Waiver and Agreement of Indemnity, albeit second-hand knowledge—information which he picked up through incidental conversations and ultimately through the context of Appellee's Exhibit 1, but the rule laid down by the foregoing cases establish beyond doubt the rule that knowledge on the part of the guarantor of itself does not prevent him from standing upon his right to exoneration.

In the instant case there was no further extension of credit or other benefits by the Bank to the corporation in reliance upon the guaranty. There is no conduct of any kind appearing in the evidence which would support a finding of waiver on the part of the guarantor. Mere knowledge of acts done by the creditor without obligation on the part of the surety does not constitute consent, for as a general rule some affirmative action is necessary. This rule is subject to certain exceptions such as appear in *Union Oil Company v. Mercantile Refining Co.,* 8 Cal. App. 768, 97 Pac. 919, and *Christie v. Commercial Casualty Insurance Co.,* 6 Cal. App. (2d) 710, 45 P. (2d) 263, but there are no facts in the instant case which would justify applying either one of these cases to our problem.

VI.

Consent to a Material Alteration Will Only Be Implied From Conduct Amounting to an Estoppel.

Where consent is to be implied, the facts from which it is to be implied must clearly warrant the implication.

50 *Corpus Juris* 114.

There are many cases in which the court has implied consent on the part of the guarantor, and many cases where the court has refused to imply consent. and although the reasoning in these cases is often vague and the language inconsistent, we think that they can all be reconciled by applying the doctrine of estoppel. We think the true rule is that when the conduct of a guarantor is of such a nature as will, under the circumstances in the particular case, estop him from denying his liability as a guarantor, then and only then, the court is justified in

finding an implied consent. The following are typical examples of the application of the rule:

In the case of *Andrews v. Austin,* 213 Iowa 963, 232 N. W. 79, the defendant guarantors were president and cashier respectively of the creditor bank. Subsequent to the execution of the guaranty, the obligations were extended from time to time by the creditor bank acting through the defendant president and cashier, who personally handled and negotiated the extensions. It was held that the defense of alteration was not available to either of the defendants for they were "conclusively charged with notice of the alteration and of their assent thereto." Although the language of the case is rather vague, it is obvious that the guarantors, being officers of the bank, and therefore occupying a fiduciary relationship with the creditor, had a duty to the bank arising from their employment, which duty was to protect the bank against the release of guarantors. Having this duty to the bank, their conduct was such as would estop them from asserting alteration as a defense to an action upon the guaranty. Any other result would have been inequitable.

In *Hallock v. Yankey,* 102 Wis. 41, 78 N. W. 156, Yankey, the treasurer of a manufacturing company, and Hertzheim, a stockholder therein, both guaranteed a loan from a bank to the manufacturing company. Yankey, in his capacity as treasurer, requested, negotiated and induced several extensions. Hertzheim was present on the first one of these occasions, but not the others. The court held that Yankey, by reason of his inducement and his affirmative action, even though done as treasurer of the corporation, consented to the extensions and modifications and therefore was liable on the guaranty, whereas Hertzheim was exonerated.

It would seem clear that the guarantor, Yakey, by reason of his conduct, would be estopped to assert an alteration as a defense from his guarantee under the doctrine of estoppel, for by taking the affirmative action of appearing and requesting and urging an extension, he was representing to the bank a willingness on his part as an individual guarantor that the extension be granted. The bank relied upon such a representation, which was a reasonable consequence of his conduct. Had the defense been available to Yankey, the bank would have sustained a loss. We have here a very typical example of the application of the doctrine of estoppel. On the other hand, Hertzheim's conduct was held to be insufficient for it was not such a representation of willingness as the bank would be justified in relying upon.

In the case of *Mundy v. Stevens,* 61 Fed. 77, the defendant guaranteed an obligation of his son. He later signed a modification agreement as the attorney-in-fact for his son. It was held that his act was sufficient to constitute consent. This is an old case and the facts are very briefly stated. In this case the guarantor's signature appeared on the modification agreement although it appeared as attorney-in-fact as the debtor. We think it is reasonable to assume that the guarantor requested the extension. In any event, there was a representation of willingness on the part of the guarantor. The creditor's reliance upon such representation was a reasonable consequence of the conduct of the guarantor. The application of the doctrine of estoppel to the case would support the finding of the court.

The foregoing are typical of those cases in which the court has implied consent. The following are typical of the cases in which the court has refused to imply consent:

Security State Bank v. Gray, 224 Mo. App. Rep. 980, 25 S. W. (2d) 512: Gray guaranteed the obligation of K Company to Security National Bank. Security National Bank subsequently dissolved. A new corporation called Security State Bank was formed, taking over all the assets of the former bank and the stockholders in the new bank were identical with the stockholders in the old bank. Gray, the guarantor, was a stockholder in both the old bank and the new, and he voted his stock in favor of the dissolution of the first bank, the formation of the second bank, and the transfer of the assets, and all other matters relating to the change-over. Held that guaranty was released by renewals and extensions made by the new bank, and that the guarantor, notwithstanding his active participation in the change-over which brought about the release, was released for there was no conduct sufficient to give rise to the implication of consent.

This case differs from the case of *Andrews v. Austin, supra,* in that Gray, not being an officer, had no obligation to look out for the interests of the bank. Furthermore, there is no showing of any reliance on the part of the bank upon Gray's activity sufficient to invoke the doctrine of estoppel.

In the case of *Springer Lith. Company v. Graves,* 97 Iowa 39, 66 N. W. 66, it was held that writing a letter by the guarantor to the creditor after the maturity of the debt, requesting that the creditor give the debtor "a reasonable chance" to pay and to give him "time and opportunity to pay" was not a waiver or a consent to an extension.

Apparently the court felt that here the conduct of the guarantor did not amount to an estoppel or that the creditor did not or was not entitled to rely upon any conduct

of the surety which might have appeared as favoring such extension. In any event, this is a good example of the strictness with which the law regards the obligation of the guarantor. Such obligation must be strictly construed. In order to preserve this strict construction, the court will strictly construe in favor of such guarantor any document which purports to contain a consent to a modification.

We again assert that the true rule is as above stated. Consent will be implied only where there is affirmative conduct on the part of the guarantor which is of such a nature, and occurs under such circumstances, as will amount to an estoppel to deny liability as a guarantor.

VII.

There Is No Evidence of Conduct on the Part of Appellant From Which the Court Can Properly Imply Consent.

Appellee throughout the trial has relied upon Appellee's Exhibit 1 [Tr. of Rec. pp. 43-44], which consists of a letter from Morrow Aircraft Corporation to the Bank as the only act from which the consent of the guarantor might be implied.

In order to place a proper value upon the letter, one must understand the circumstances preceding the signing of the letter. As we have already pointed out, some time prior to the execution of the letter, the appellant, the other officers and the members of the Board of Directors of the Morrow Aircraft Corporation, had disagreed with Goodwin, the agent of the Bank, all of which had resulted in Mr. Goodwin being given complete control of the affairs of the corporation to the exclusion of the officers and directors. This had to do not only with production, but

it went far beyond that, for it was he, in collaboration with the representatives of the Federal Reserve and the War Department, who instigated and carried on the negotiations for the Joint Adventure with Fritz Ziebarth. In this regard, the officers of the corporation were completely ignored. It was not thought that their presence was either necessary or proper at such negotiations. In all probability, this was not done by design, but the relationships of Mr. Goodwin to the corporation were such that it did not occur to anyone that the officers or the directors of the corporation had any place in such negotiations.

Mr. Morrow found out about them casually and through indirect means. It would have been of little use for him to protest or object, as the Bank held substantially all of his stock in the corporation on a pledge, and with little difficulty could have called the loan, foreclosed the pledge and exercised actual voting control over the corporation. Furthermore, at that time we were absorbed in the exigencies of fighting a war where the personal rights of individuals were readily sacrificed less a person be considered as impeding the war effort. And so Mr. Morrow cooperated with Mr. Goodwin to the extent of standing by and doing such formal things as a president of a corporation might be required to do to carry out the bank's program but without any power of decision or other authority.

With things in this condition, the Bank, out of its own knowledge of the negotiations and proposed agreement with Fritz Ziebarth, prepared the letter in question for the

signature of some responsible officer of the Morrow Aircraft Corporation. Mr. Morrow was asked to sign it. Mr. Morrow read it over and signed it as President of the Morrow Aircraft Corporation.

Assuming the letter to be a consent on the part of the corporation, we submit that, particularly under the circumstances related, Mr. Morrow's act of signing the letter as president of the corporation is not such conduct as the bank was justified in relying upon as the consent of the guarantor. In fact there was no reliance placed upon it by the bank. [Tr. of Rec. p. 152.]

This is not the case of the corporation president and guarantor who goes to the bank and pleads for an extension such as was true in the case of *Andrews v. Austin, supra.*

This is not the case of a treasurer of a corporation who is also a guarantor, requesting, negotiating and inducing extensions of the primary indebtedness, such as was true in the case of *Hallock v. Yankey, supra.*

This is not even the case of a guarantor writing the creditor requesting that the debtor be given a "reasonable chance," "time and an opportunity to pay," as occurred in the case of *Springer Lith. Company v. Graves, supra,* in which the court held even here that there was no waiver and no consent implied.

To imply a consent in a situation such as we have in this case, would be going far beyond any case we have been able to find. But this letter does not purport to be a con-

sent, waiver or approval of the terms and conditions herein set forth, nor was it a request, even on behalf of the corporation. Its only effect is an admission on the part of the corporation, and possibly Howard B. Morrow, of full knowledge that the Bank was being required to make the commitment therein stated. To give the letter any meaning beyond merely an admission of knowledge, would be to read into it something which it does not contain. This particular letter was prepared by the Bank, upon its own instigation [Tr. of Rec. p. 141], and any ambiguities or uncertainties therein must be interpreted most strongly against the Bank.

Civil Code, Sec. 1654;
4 *Cal. Jur. Ten-Year Supp.,* p. 135.

Then to apply the doctrine of estoppel to the circumstances here, it most certainly cannot be said that the Bank was ignorant, actually or presumably, of the truth, for it, in this particular case, not only knew all the facts, but had a greater knowledge of the entire transaction than did the appellant. Furthermore, there was no intention on the part of the appellant Morrow, either expressed or implied, that any reliance whatever should be placed upon the letter, nor did the Bank rely upon any silence or acquiescence or misrepresentation on the part of the appellant. Whatever the purpose of the letter may have been, it has no legal implication as a consent, approval, request, waiver, or otherwise than as an admission of knowledge of the facts therein contained.

Summary.

In conclusion, we respectfully submit that the complaint does not state a cause of action, and that it is defective in at least three respects. In the first place, at the time the complaint was filed, no cause of action existed against the appellant for the rights against the primary debtor were then suspended. Secondly, it appears on the face of the complaint that the note alleged to be the primary indebtedness differs in a material respect from the note described in the guaranty. And thirdly, it appears that there was no primary indebtedness in existence at the time the guaranty was executed.

We have next contended that if the guarantor was ever liable upon the guaranty, he was exonerated by a material alteration of the primary indebtedness to which there was no consent. Although the appellee has contended that the material alteration was consented to, it has failed completely to show actual consent and has relied entirely upon the letter marked Plaintiff's Exhibit 1, as conduct from which a court may imply consent.

We have further contended that the conduct of the appellant in executing the letter aforementioned is not such as will support a finding of the trial court of consent.

We submit further that the trial court erred in rendering a judgment in favor of the appellee and that this action should have been dismissed.

Respectfully submitted,

CURTIS & CURTIS,
Attorneys for Appellant.